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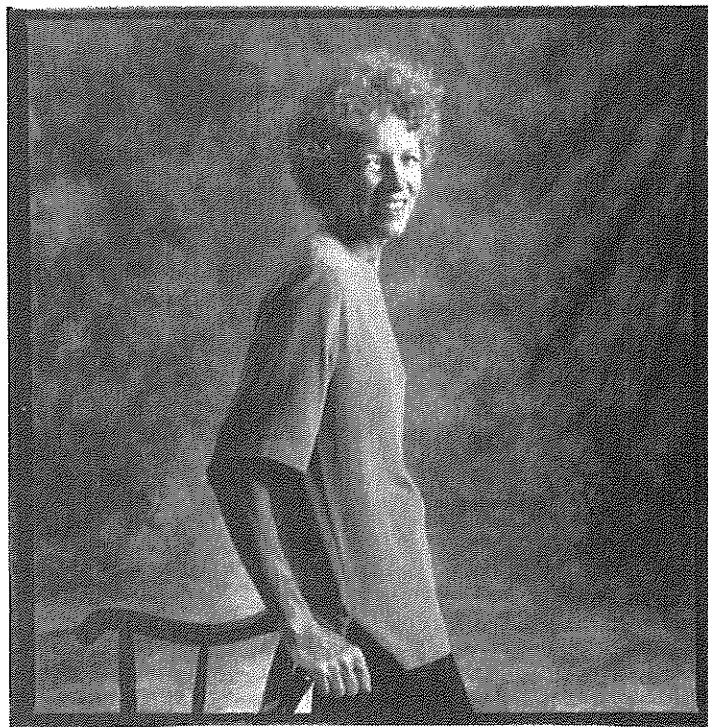
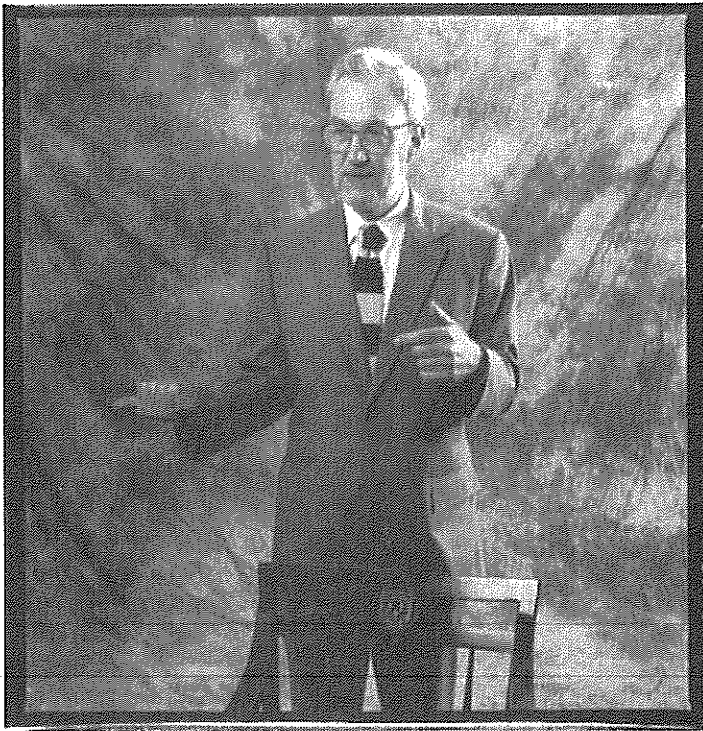
DUNCAN KENNEDY AS I IMAGINE HIM: THE MAN, THE WORK, HIS SCHOLARSHIP, AND THE POLITY

*Peter Goodrich**

The fall 1996 issue of *Harvard Law Bulletin*, the school's alumni magazine, carries a lengthy section on recent appointments to named chairs at the school. Each newly endowed law professor is photographed. In the accompanying text they are interviewed, and their work is described. The section is preceded by a stark, full-page photograph of a plain, hardwood chair, emblazoned modestly with Harvard's succinct motto, *veritas*. It is, by obvious implication, from this chair, and with this seat or foundation, that the newly nominate, senior professoriate will speak, *ex cathedra*, as it were.



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An HLS professor who was one of the leaders of the hotly debated critical legal studies movement in the early 1980s has a new book forthcoming, in January from Harvard University Press. Duncan Kennedy calls *A Critique of Adjudication Fin-de-Siècle* in part "a critical

legal studies manifesto after the fact. I'm trying to make sure those ideas don't just disappear even though the movement is pretty much dead in the water at the moment." The book explores theories Kennedy has been developing for 20 years. "I argue that an enormous amount of law in our society is made indirectly by judges through interpretation—which everyone knows, but many spend a lot of time denying—and I ask what difference it makes that we do it this way rather than, say, through legislation."

Kennedy also plans a book about housing policy based on 15 years of lecturing and supervising student papers for the Housing Law and Policy course he co-teaches with Jeanne Charn '90, director of the Hale and Dorr Legal Services Center. "A benefit of teaching a course like this, in which students work in clinical placements at the Legal Services Center, is that it helps you keep up with the way the subject looks out in the field."

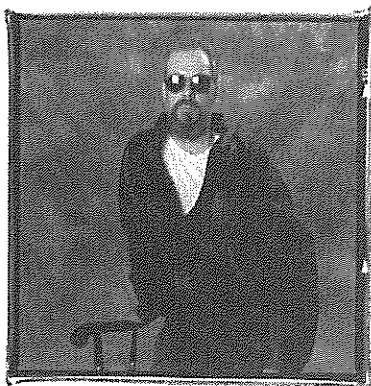
No stranger to controversy, nor reticent about stating his opinions, Kennedy enjoys intense exchanges with his students. "I have to admit I have an exhibitionist undercurrent. I love the dramatic aspect of large Socratic classes," he says. "Everything I've written has been strongly influenced by student reactions to my attempts to explain my ideas, and by their challenges once they do understand."

He undertakes his new book at a time when the political climate, budget constraints, and public housing's "bad rap" have devastated federal aid for low-income housing. But other developments could have cumulative good effects, he says, such as the new emphasis on micropolicies in neighborhoods. A significant, nonprofit affordable-housing sector is emerging

in the form of community development corporations, land trusts, and limited-equity co-ops.

"I want to develop technical analysis for contextual regulatory strategies that make it possible to soak the rich more effectively on behalf of the poor's housing needs," Kennedy says. He hopes lawyers and others working on housing in mainstream institutions "will adopt a kind of intellectual guerrilla warfare to exploit the system and find the caches of money that can be used for a good purpose—while ideally shaking up the institutions a little bit too."

Kennedy's book on housing will examine "about 25" liberal housing policy initiatives and demonstrate "that the standard law and economics critique of each initiative as inefficient and damaging to the people it aims to help is based on bad economics." In fact, he argues, when the initiatives do work it is because they effectively redistribute wealth. He has a double agenda: to build a general case for large-scale redistribution of wealth and to conduct "some countertraining." Says Kennedy, "What's arbitrated across the divide between academic economics and law and economics overwhelmingly fits the conservative agenda. I want to arbitrage more of the liberal thinking that's going on across this same boundary." ~



DUNCAN KENNEDY

CARTER PROFESSOR
OF GENERAL JURISPRUDENCE

The men are pictured in legal garb, in suit and tie, momentarily interrupted it would seem from their work in office, library, classroom, or court. The only woman reposes in more convivial attire and is photographed from the side, serious but accessible. The exception or anomaly is the Carter Professor of General Jurisprudence, yours truly, Duncan Kennedy, who is photographed against a dark, blank background, bearded, balding, with large dark glasses shielding his eyes, a black leather jacket and white T-shirt adorning his body. He is portrayed as leaning casually against a schoolroom chair whose visible parts seem fortuitously to form a pi sign.

In visual terms, Kennedy is the exception, the rebel, the marginal at Harvard Law School whose carefully choreographed appearance not only challenges the implicit semiotic norms of the *Bulletin* and the distinguished law school professoriate it represents, but also parodies the authority of the endowed chair to which he has been promoted. The first accent of this critical intervention is visual and stylistic. He is dressed for urban combat, he is everyday cool, sympatico but with attitude, and in the accompanying text he talks of adopting "a kind of intellectual guerilla warfare" against the institution.¹ Elsewhere in the profile, Kennedy admits to "an exhibitionist undercurrent" and to a love of the drama of the classroom. Combined, these attributes allow us to glimpse, in a mannered and frontal form, the self-described "weird kind of extreme leftist"² (or, in other words, existential Marxist) that the name Duncan Kennedy elicits and enacts.

It is upon the personification of the "weird" and its paradoxical scriptural enactment in *A Critique of Adjudication: Fin de Siècle*³ ("*Critique*") that this Essay will focus. The photograph of the distinguished Carter Professor is in numerous senses a paradoxical one. For a start, his subject is general jurisprudence, a vague appellation in a discipline of particulars, a tautology or an oxymoron. The portrait of the distinguished professor, however, captures him—like *Iustitia*—with his eyes hidden. Borrowing one of the older meanings of "weird," namely "of fate," he is Clotho, or the spinner of tales, a particular kind of justice, and in textual terms a narrative of fatality. More to the point, the teacher looks like a student. He is growing old but dressing young. The professor has recently been promoted to a named chair, and yet this emblematic figure of the law school is depicted without props and free of all or any reference to law. To add to the succession of dadaist propositions, it transpires in the interview that the professor's latest book, soon to appear, has been a "manifesto" for a movement that has failed and is "pretty much dead in the water."⁴ The final paradox is thus that the intellectual guerrilla, the weird extremist, the radical leftist has been devoting his time to conserving a relic: "I'm trying to make sure those ideas don't just disappear"⁵

¹ Julia Collins, HARV. L. BULL., Fall 1996, at 24, 24 (reprinted by permission from the *Harvard Law Bulletin*). Photographs courtesy of Richard Chase.

² Duncan Kennedy, *Politicizing the Classroom*, 4 S. CAL. REV. L. & WOMEN'S STUD. 81, 83 (1994) [hereinafter Kennedy, *Politicizing the Classroom*].

³ DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE (1997) [hereinafter CRITIQUE].

⁴ HARV. L. BULL., *supra* note 1.

⁵ *Id.*

The paradox, or healthy symptom, that I wish to pursue relates most directly to this last statement of project for Kennedy's *summa juridica*, his general jurisprudence of adjudication. What does it mean, in other words, to be the custodian of critique? What practice is implied for the curator of cool? What are the politics of hotheaded moderation? What, finally, is the distinctive epistemic of "a severely chastened" critique, or "Pink Theory" of law?⁶ Kennedy's answer to those questions is both general and positive: we have to stick with each side of the paradox, we must live with contradiction—fundamental or other—and play both faces of the institutional game. In what follows, I will trace fondly the trajectory of this cool compromise, of this essentially academic politics, and endeavour to elicit the particular practices, the administrative, scholarly, and pedagogic interventions that it condones and reproduces.

I. MAN AND MANNER

In both its appearance and its self-description Duncan Kennedy's politics is based in authenticity. He looks like he is "out there" and he speaks like he is "out there." *Critique* espouses the maxim that "the personal is political."⁷ It is replete with intimate confessions, private anecdotes, and waking residues of nightly dreams. We learn of what made him blush,⁸ of his fear of being "just [another] Hartian,"⁹ of what woke him up one Sunday morning.¹⁰ Kennedy's heart appears to be worn on his sleeve and his quiet yet persistent embrace of the other—judges, women, minorities, the poor, conservatives—projects his political authenticity, his "pink" practice, into the weakest lit corners of the polity. To borrow from his sometimes rather underinformed rhetorical theory, Kennedy also teaches us that the character of the author, her prestige, his status and charisma, is an important dimension of the persuasiveness of what is said or judged or done.¹¹

Kennedy's politics, in other words, are explicitly personal and implicitly embodied. It is necessary, therefore, to begin by dispelling the notion that the man can be separated from the work, or that the book can be reviewed without addressing the author, whether that author be interpreted as a textual marker, a name, a

⁶ CRITIQUE, *supra* note 3, at 5, 294.

⁷ *Id.* at 376.

⁸ *See id.* at 314.

⁹ *Id.* at 177.

¹⁰ *See id.* at 143.

¹¹ *See id.* at 167.

person, as dead or alive. Let me put it like this, and at the risk of sounding biblical, I have met Duncan Kennedy three times and it has not gone well.

In terms of direct encounters, I first met him at a round table on the semiotics of law at State College, Pennsylvania. Afternoon was turning to dusk when Kennedy rode in and delivered a seemingly impromptu keynote address on legal semiotics. He claimed he had always wanted to be the Levi-Strauss of law, but I misunderstood the talk as making the claim that Duncan was as good as a judge—he had the mana and charisma, and to a European he seemed to want to be one. Maybe for that reason, for that appearance of eminence, he also seemed steeped in knowledges other than those of the rhetorical and semiotic. After that, things only got worse.

I met him next at a critical networks conference in Boston in 1992. He did not attend my presentation but did discuss it with me and pronounce that my criticisms of U.S. critical legal studies ("cls") were too strident and too loud.¹² Later during that same conference, when Duncan was exercising a policing function, taking tickets at the door of a brown-bag luncheon, I mimed rebellion and walked straight by.

When we last met, at a conference in New York, he was handing out flyers for his book *Sexy Dressing Etc.*¹³ Michael Fischl said to him, "It is good that Harvard is doing the book." I, on the other hand, said that it was unfortunate that the book consisted entirely of papers that had already been published and that he had not had anything new to say. Francophile that he is, he slapped his forehead with disbelief at the crassness of my remark and intoned, "I can't believe you said that." Since then there has been silence, yet silence has an underside and in this case he has communicated about me, to me, through mutual friends. There are many instances, and if I mention several of them it is in part for Duncan and me, to clear the air, to embrace, and in part because these are our practices, our exercises of power, our meaning.

So at the risk of dwelling lugubriously upon the painful, a year after the Boston conference I was invited to speak in Holland by Nik Huls, a Marxist legal scholar. At some point during the few days I spent in Amsterdam he recounted receiving a lengthy letter from Duncan. Nik had asked Duncan what he thought of my piece

¹² This paper, which also upset my co-panelist Peter Gabel, was published as *Sleeping with the Enemy: An Essay on the Politics of Critical Legal Studies in America*, 68 N.Y.U. L. REV. 389 (1993).

¹³ DUNCAN KENNEDY, *SEXY DRESSING ETC.* (1993) [hereinafter KENNEDY, *SEXY DRESSING*].

on U.S. cls and the lengthy epistolary response had been that it was a misunderstanding, a misinterpretation, and was misinformed on all counts. Nik was advised that it was not worth bothering with this ludicrous analysis. I intuited that Duncan did not like the piece, but I was touched by the warmth of the denunciation. It also seemed slightly personal.

When Tony Carty shared a room with Duncan at an international law gathering organized by David Kennedy, Duncan, not knowing that Tony was a friend of mine, waxed lyrical on how awful I was and had been to him. Duncan then said that he felt he must have done something to offend me for me to be so hostile to him. So he thought it was personal as well. And yet, it was also institutional. Later when I was visiting at a law school in the United States and seeking a position there, Duncan announced loudly at a party held for him by colleagues of mine in London that he hoped I did not get the job. He would prefer that it be given to someone else. I never did get that job.

Caught in the glare of the intimate public sphere we doubtless all have regrets. The political currency that circulates in the informal economy of institutional friendships is often spent carelessly or unthinkingly. That is not my point. Nor is it my purpose to wreak revenge upon my fellow traveler either by exposing our history of mutual antagonism or by punishing Duncan with the kindness of my review of his book. It is, however, my view that if we are to talk meaningfully about the "local politics" of cls, about "politicizing the workplace," or about the authenticity of radical commitment, then the melancholic recollection of these intimately public judgments is a necessary element in that discussion.¹⁴ Put it this way, for all that the left academy speaks in the idiom of self-reflection and interpersonal honesty—authenticity or political commitment—those critical virtues and attendant analytic skills are almost never turned upon the everyday life of institutional practice.¹⁵ The casual conversations, the names that are dropped, the telephoned recommendations or e-mailed disavowals, the reviews of

¹⁴ See CRITIQUE, *supra* note 3, at 358, 376.

¹⁵ Within the cls network, David Kennedy probably comes closest to examining the everyday, but the everyday that he examines is curiously or symptomatically that of the professor on vacation, away at conferences, and out of term. See David Kennedy, *Autumn Weekends: An Essay on Law and Everyday Life*, in LAW IN EVERYDAY LIFE (Austin Sarat & Tom Kearns eds., 1995). See also PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1992), which remains the exemplary and most challenging analysis, and DERRICK BELL, *CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTER* (1994), especially chapter 7, *Silent Acquiescence: The Too-High Price of Prestige*.

manuscripts, the formal references, let alone the teaching and mentoring relationships, are the stuff, the lifeblood, of the quotidian academy. In the main they are also the beginning and the ending of the political practice of cls. They are the sites in which theoretical interventions are formulated, in which radical histories are written, and in which political inclinations or positions are both announced and acted out. I want to suggest quite simply that they merit the same degree of scrutiny as the formal and more consciously staged representations of political position that fill the agendas of critical conferences and the pages of critical legal literature.

I cannot, therefore, deny that I know Duncan Kennedy. Equally, I have to admit to the character of that knowledge, that to some extent I read his work through the lens of our encounters, through what I know. By the same token, *Critique* is written so as to theorize those encounters. Our relationship is in a sense a projection from the writing. I do not believe that I should exclude myself from analyzing *Critique* because of those imbrications; indeed, I should recuse myself only if I hid that history or was inane enough to believe that those encounters did not matter. I also should admit, and in equally positive tones, that I have read *Critique* as part of a theoretical trajectory that began with what I believe to be a brilliant book about the politics of law school: *Legal Education as Training for Hierarchy*.¹⁶ Indeed, I have taught that text for many years. I have read it repeatedly with students, with colleagues, with intensity, with love. And again, its thesis is in large part that there is an unconscious message or "other scene" to the practices and communications of the law school classroom, faculty interactions, and, perhaps most of all, the examination halls. In short, the paratexts that I have examined, the words and images in the *Bulletin*, and the recollection of various interactions and exchanges are part of the meaning of *Critique*; they are aspects of its politics, parts of its practice within the intimate public sphere that increasingly defines the relay or network, the virtuality that the critical legal conference has become.¹⁷

II. THE WORK

Remaining with the paratext, up close and personal, I have already drawn attention to Michael Fischl's remark that the book not yet foretold was being published by Harvard University Press.

¹⁶ DUNCAN KENNEDY, *LEGAL EDUCATION AS TRAINING FOR HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (1983).

¹⁷ I borrow the useful notion of paratexts from Gerard Genette. See GERARD GENETTE, *SEUILS* (1988).

On the fly leaf—curiously without photograph, though fortunately of course we can fill this in—the Carter Professor of General Jurisprudence is described as also being the author of *Sexy Dressing Etc.* (Harvard). The work, in other words, arrives not only *ex cathedra* but equally is undergirded by the prestige of Harvard, of its press and of its motto, *veritas*. Lingering on the paratext, what is immediately interesting is that the self-designated “intellectual guerilla” is publishing with the highest status university press. The anarchist intervenes in the most conventional of forms. This “weird kind of extreme leftist” here appears in ten- and twelve-point type between plain beige covers. The eccentric is part of the mainstream. On the back cover the book is compared favorably to H.L.A. Hart’s *The Concept of Law*¹⁸ and Ronald Dworkin’s *Law’s Empire*.¹⁹ More than that, the Carter Professor, whose portrait shows a man in leather and dark glasses, dressed out of Milan like an Italian bank guard circa 1984, is “one of the most prominent and influential legal theorists of the day”—a blurb to die for from William Simon, a law professor at Stanford, a school that in recent surveys has ranked as the equal of Harvard.

Replete with all these paratextual insignia of status and success, *Critique* is also, and probably accurately, described by its back-cover panegyrist as “a major effort.” Put differently, this work is both an expression and a manner of wielding significant cultural capital and extensive symbolic power. Remembering also that one definition of weird is “that which comes to pass,”²⁰ we can infer that this is a work with a definite intention, a book that aims to have effects. The first desired effect has already been mentioned. *Critique* is intended to ensure that the ideas represented by cls “don’t just disappear.”²¹ Clearly, if this means that there be some extant record of these ideas then the task is an easy one: the ontology of ideas is the ontology of books. It does not seem likely that the record of publications, or indeed the annals of Harvard Law School, will disappear. Nor does it seem plausible to fear that the record was somehow inaccurate: Duncan Kennedy’s “anthropology” of legal thought, his phenomenological account of judging, and his lucubrations upon Pink Theory are neither presented as exhaustive nor propounded as definitive. Duncan’s views to the contrary, there is no canon to memorialize,

¹⁸ H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994).

¹⁹ RONALD DWORKIN, *LAW’S EMPIRE* (1986).

²⁰ CHAMBERS’S ETYMOLOGICAL ENGLISH DICTIONARY 725 (A.M. Macdonald ed., 1967).

²¹ HARV. L. BULL., *supra* note 1.

simply a disparate and mutating set of textual corpora to examine and, in examining, to change.²² Thus, salvaging the ideas from disappearance would seem to mean something more than inaugurating a museum or archive of a well-publicized, if contested, literature. It would seem plausible to infer that the ideas must be kept alive, they must be taught. The corpora of cls are those of the students, former students, and teachers who continue the work of cultural criticism, pedagogy of policy, and opposition to the concepts and repressive practices of legal correctness.

It is the fate or fortune of the arts academy to which law belongs to be bound in the main to theoretical practice. Its local politics is acted out in the classroom, the seminar, the corridor, the faculty meeting, the law review, and the library. The immediate audience for its prolixity of publications is the university, and both modesty and realism suggest that to achieve the maximum political effect possible within the constraints of the academy requires that a text be directed at the largest constituency of the university—its students. If the maxim that in the third year of law school they bore you to death is correct, then *Critique* is aimed primarily at third-year law students. Paradoxically, this is its greatest rhetorical strength and its primary political virtue. It is boring in the sense of a drill, or Marx's mole. It is, in other words, a remorseless work, it is unrelentingly didactic and exhaustively accessible. It offers, step by inextinguishable step, not a history but a lesson in cls U.S.A. It follows each and every twist and turn in the critical debate over freedom and constraint in judging. It bores unrelentingly at the question of the internal politics of judging.

Boredom also, if a brief digression upon a digression is permissible, is described psychoanalytically as a symptom of bereavement, of having recently lost or given something up.²³ Boredom is the sign of still holding on to what has disappeared. In Duncan's case—and he is always disarmingly honest—the explicit beareavements in question are first the loss of faith in legal reasoning, latterly a loss of faith in legal rights, and finally a loss of faith in totalizing theories.²⁴ The first loss made him blush, the last

²² It seems strange to argue, as Duncan does, that there is a canon, a straight rod or law of cls. I have no wish to be pedantic, nor do I have any desire to correct the Carter Professor (canon Kennedy perhaps), but the fluctuating histories and playful fragmentations of critical legal scholarship do not benefit greatly from the assertion "[n]ow that a canon is constituted . . ." *CRITIQUE*, *supra* note 3, at 10.

²³ See ADAM PHILLIPS, ON KISSING, TICKLING AND BEING BORED: PSYCHOANALYTIC ESSAYS ON THE UNEXAMINED LIFE 3 (1992).

²⁴ As Kennedy writes: "And loss sometimes proceeds by a process like metaphor (or is it metonymy?) in poetry. For example, in the rationalism/irrationalism debate, loss of

one made him nostalgic.²⁵ The question to be asked, however, is what these losses did to him politically or meant in practice. The answer seems to lie in another paradox: they turned him toward an oppositionist pedagogy of law, an "internal critique," and toward a political aesthetic. One could say that he turned toward *Sexy Dressing*, a color-coded radicalism, and set out to become the emblematic Pink Theorist.

The beard, the leather jacket, the dark glasses—the guerrilla togs and fighting words—clearly indicate a man who at some level does not accept the norm. In his earlier critical catechism, *Legal Education as Training for Hierarchy*, Kennedy argued polemically for immediate equality in the legal academic workplace and trashed law teaching and doctrine as "nonsense." By the time of *Critique*, the politics are more moderate: "My strategy aims only to undermine and entice."²⁶ In the academy, the subjects of seduction are students who will go on to be lawyers and law teachers. You cannot plausibly seduce them with the argument that they should share the salary level of the janitors or secretarial staff, and little is undermined in practice by discounting all teaching of legal rules as a masquerade for policy. The explicit and moderate message of the later work is thus that cls (at Harvard) carries a considerable burden of responsibility.²⁷ It is part of the reproductive process of legal education; it inculcates law at many levels, and so should reflect upon its own practices of denial and its inherent bad faith.²⁸

Teaching law means teaching law. With occasional intimations of senescent ennui, Duncan at various junctures accedes to the point that legal rules govern adjudication and that judges are "to a significant extent, practically 'bound' by law."²⁹ More than that, law is frequently determinate, rules often dictate

faith seemed to 'spread' like a disease, or jump like a forest fire, from legal reasoning to totalizing theories of law and economy." CRITIQUE, *supra* note 3, at 314. Is it largesse or hauteur, incidentally, to claim to have been influenced by Ferdinand de Saussure and at the same time claim not to know, and actually not know, the linguistic importance of the distinction between metaphor and metonymy?

²⁵ See *id.* at 296.

²⁶ *Id.* at 340.

²⁷ See Miki Alberstein, *Getting to Where? On Peace Making and Law Teaching at Harvard Law School: (or, Some Private Hope and Public Irony)*, 10 LAW & CRITIQUE 323 (1999), which interestingly suggests that when Kennedy embraced pragmatism he lost his faith in critique.

²⁸ I was pretty clear with myself that I was not going to fall into the trap of citing myself in this Essay. However, because I think Pierre Schlag's work is very much to the point, and because I discuss this issue elsewhere and hence can achieve a certain brevity here, and because you might not yet have read this coruscating and appreciative paper on "against law," see Peter Goodrich, *Law-Induced Anxiety: Legists, Anti-Lawyers and the Boredom of Legality*, 9 SOC. & LEGAL STUD. 143 (2000).

²⁹ CRITIQUE, *supra* note 3, at 275.

applications, and judges will on countless occasions decide cases according to rule applications with whose political implications they disagree: "You don't hesitate to say I haven't closed the door when I close the window."³⁰ Later on, this accession to reason is explained with cool charm: "I see myself here as the representative of the reality principle,"³¹ and the reality principle here stipulates that "we reject the ontology of determinacy and indeterminacy in favor of the notion of constraint as a function of legal work."³² Radicals have to give up the notion that all legal decision making is ideological and accept instead a more limited position. At the level of theory, the radical law professor must acknowledge and enact what in the 1970s was termed by Trotskyists an "entryist" politics, while in terms of teaching practice, seduction comes, as we all know, in the form of liberalism.

If the frequent recourse to equestrian metaphors and particularly the allegory of the Trojan horse is anything to go by, one might be forgiven for thinking that, at the level of theory, *cls* arrives as the cavalry upon the scene of legal education. Where Hegel saw Napoleon on horseback as the instantiation of the world spirit, however, Kennedy sees the crits curled up in the stomach of a wooden horse as the representatives of an ineradicable radical tradition. They are sleepers in the law school faculty, critical opportunists, *bricoleurs*, who await the twenty-first century night when under cover of darkness they will crawl out of the belly of the beast.³³ In the meantime, and because we have tenure, we can dress radical and talk dirty. The political aesthetic that Pink Theory proposes is avowedly opportunistic and eclectic. It is also here and now in the sense of an existential politics of authenticity. The denial and bad faith that characterize the judiciary are matched by the unhappy consciousness of the critical legal intellectual. The way out is aesthetic in the Foucaultian sense of care of the self and a correlative development of new lifestyles, new forms of relationship, friendship, and respect.

Very precisely, and very briefly, Kennedy entices us behind the mask of his puritanical prose and whispers that the critical position is "to resist [power], not to seize it."³⁴ On the margins of the law school he wishes to disrupt the rational grid through emotional intensity and theoretical transgression. The "normal science" of law is broken down through the "liberat[ion] [of]

³⁰ *Id.* at 160.

³¹ *Id.* at 198.

³² *Id.* at 174.

³³ On the Trojan horse of policy, see *id.* at 97 *passim*.

³⁴ *Id.* at 271.

'contradiction,' 'alienation,' 'desire,' 'irony,' 'doubleness,' 'despair,' 'ecstasy,' and 'yearning.'"³⁵ This is explicitly a politics of style, a practice of the performative, or, to borrow from the King James translation of Saint Paul, he kicks against the pricks. The incitement is to live critically, to deconstruct the law school from within, to subvert like a "worm at the heart of being."³⁶ Just for the sake of completeness, the naturalist metaphor of the worm—of the godless natural destruction that conserves life—is complemented by the medical and now cyber metaphor of critique as a virus. The crits are grubs who gnaw away at belief in the rationality or correctness of law. Their politics is invisible, internal, unseen, and contagious. Like justice, whose figure Duncan mimicked in his self-portrait, they destroy the law so as to preserve the law. And if we are worried that it is hard to feel good about yourself if you are represented as a worm, we are rapidly reassured that there is comfort in numbers and in connection: the wound of our exclusion, the frustration and despair or even boredom of loss of faith in law, can give way to "wild moments of breakthrough insight and intense moments of emotional involvement with others."³⁷

Paradox is not a choice, it is a condition.³⁸ What Kennedy does, with consummate constraint, with extreme patience and enviable detail, is hold a gentle mirror to the political paradoxes that face oppositionists in power. His work is a version of *Les vérités de la Palice*;³⁹ it is a statement of the obvious, a full, frontal, and unexpurgated depiction of the critical condition as political action. He shows us that there is a politics to critique, and he shows us that, at least in conventional Marxist terms, it is not much of a politics. That is the paradox and the potential of cls. There is no revolutionary movement to join, there is no haven for radicals outside the academy, there is simply the slow ticktock of law, and

³⁵ *Id.* at 345.

³⁶ *Id.* at 82.

³⁷ *Id.* at 345.

³⁸ I am at it again, but this time my excuse is that cultural differences tend to mean that what is published in obscure English periodicals is seldom read in the United States, and so, on paradox and the politics of critique, see Peter Goodrich, *Anti-Teubner: Autopoiesis, Paradox, and the Theory of Law*, 13 SOC. EPISTEMOLOGY 197 (1999); Peter Goodrich, *The Critic's Love of the Law: Intimate Observations on an Insular Jurisdiction*, 10 LAW & CRITIQUE 343 (1999).

³⁹ See MICHEL PÊCHEUX, *LES VÉRITÉS DE LA PALICE* (1975), translated as MICHEL PÊCHEUX, *LANGUAGE, SEMANTICS AND IDEOLOGY* (Harbans Nagpal trans., Macmillan 1982) (1975). Monsieur de la Palice, so the song goes, delights in the evident, though occasionally, humourously, substitutes effects for causes. The song ends: "By a sad fate/He was wounded by a cruel hand./Since he died of it, it is thought/That the wound was a mortal one./He died on Friday,/the last day of his life./If he had died on Saturday/He would have lived longer." *Id.* at 16.

there is our interpretation and teaching of it. It is this paradox or limit that the legal radical has to live critically and to organize around. How, in other words, is critique to be marketed? How and to whom is a left position in law to be sold?

The paradox of critical legal politics comes down to the contradiction between the radicals' critique of power and their exercise of it in the classroom and the academy. What is the critical position of an examiner? What does critical grading look like? How should the critics spend the informal currency of institutional status, network, and influence? While Kennedy answers that they should do so virally and subversively, it is not clear what this actually means. Indeed, if we look elsewhere, to an essay entitled *Politicizing the Classroom*, it seems to mean teaching law as it is, "bar review type stuff" or black-letter doctrine, so as not to "risk losing the students."⁴⁰ Eschewing the temptation to indoctrinate or to preach to the nation's future corporate lawyers, Kennedy uses his "authority as a teacher"⁴¹ to show the students the gaps, conflicts, and ambiguities in the system. The final step in politicization involves showing socratically how judicial choice and student responses to it can be divided along a spectrum ranging from moderate liberalism to moderate to extreme conservatism.⁴² The end result is legitimate "fun" and an experience of authenticity on the part of the "radicalizing teacher."⁴³ The students, for their part, learn that the law is the law and that it is in conventional terms political in the sense of adopting policies that range from liberal to conservative.

At a descriptive level, Kennedy would seem in a restrained kind of a way to have got it right. He wisely offers no legal *promesse de bonheur*. He describes the plight of what Lenin termed socialism in one country. He describes what most of us do in our teaching of bar (or required) courses. Some may add a little Marxist theory, sociological detail, or historical description of inequalities and discriminations, but they still teach the law or at least their image, better or worse informed, of what judges do and say. And so one is left with the irresistible conclusion that the moment of radicalism, the extremism rather than the weirdness of leftism, is still to come. Indeed, and here I am guessing, Kennedy drops the name of Foucault sufficiently often to suggest that

⁴⁰ Kennedy, *Politicizing the Classroom*, *supra* note 2, at 81. For a devastating critique of this piece, see Penny Pether, *On Foreign Ground: Grand Narratives, Situated Specificities, and the Praxis of Critical Theory and Law*, 10 LAW & CRITIQUE 211 (1999).

⁴¹ Kennedy, *Politicizing the Classroom*, *supra* note 2, at 84.

⁴² See *id.* at 81, 83.

⁴³ *Id.* at 82.

perhaps a more resolute position could be elaborated from that particular critical saint's writings.⁴⁴ Such an endeavour would take us more directly into the question of the scholarship of the work, but it does deserve a few initial failing words.

In synoptic political terms, Foucault's project was that of elaborating alternative knowledges and alternative lifestyles or forms of relationship. He saw the two as connected. A consistently Foucaultian legal educational politics would thus seem to me to involve disruption of the rational grid through which law is taught. The old categories of doctrine, the legal conceptual map and classifications, the universalia and other fictions of nonplace, would, in this political schema, come in for challenge and critique. Not only would critique facilitate new communities of teachers but it would also hurl the legal curriculum into the university and the interdisciplinary context of cultural and media studies and gender- and race-based epistemologies and practices.⁴⁵ We could imagine jazz law, courses on the governance of the intimate public sphere, an exam on the mythologies of property law, essays on the gender of contractions, seminars on the color of words, a jurisprudence of industrialized anarchy, a history of courts of moods and codes of love, and a *Crying of Lot 49*. Wouldn't the Foucaultian teach that the critic is under a duty to question the order of things and to bore a little into the archaeology of our knowledge of law?

The critical legal project I am suggesting has begun, but it remains largely in the future. *Critique*, when it is not saving the past, the ideas of critical legal scholarship, or memorializing and interring some argument or other about adjudication or horses and policy, is a valuable contribution in the sense of clearing the ground or scouting the foothills. Honest effort deserves honest praise and so, too, it should be admitted that the arduous labor of rethinking the categories through which law is taught, the exhausting work of reclassifying the foundations of legal knowledge, is not something that any of us crits has gone far in accomplishing. It is much easier and certainly less labor intensive to teach the law as it is provided in the casebooks and classified by the curriculum. We all to some extent peddle Kafka's sawdust already chewed by many mouths. And all of us pretty much stand up as teachers and ask the questions, set the exams, and submit to

⁴⁴ On Foucault's politics of lifestyle, see the wonderful DAVID HALPERIN, *SAINT FOUCAULT: TOWARDS A GAY HAGIOGRAPHY* (1995).

⁴⁵ For instance, in terms of radicalizing the structure of transmission of legal knowledge, see LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* (1997). See also bell hooks, *TEACHING TO TRANSGRESS* (1994).

the grade curve. And if that pisses us off, who is to say that our anger doesn't get acted out in academic attacks upon our fellow traveling critics for not being radical enough?

III. HIS SCHOLARSHIP AND THE POLITY

Almost everything about his aesthetic style tells us that the author of *Critique* perceives himself as not fitting in. The professor who posed for the *Bulletin* portrait wearing dark glasses, who publishes his critique between plain brown covers, who writes of radical ideas—of transgression, disruption, and emotional intensity—in the blindest of prose, is someone who is obviously writing on several different levels at one and the same time. Clearly, one audience is that of students, and, as I have discussed it, he seems to wish to jog them gently toward some kind of awareness of political culture in the United States. He argues that law is a part of that culture but has, to my mind, a rather limited view of the rainbow of possibilities that the leftist part of that culture has now become. All the same, if the book is aimed incontrovertibly at the unconverted, then moderation is its key to the power of persuasion.

If it is hard to imagine any Sartrean group-in-fusion⁴⁶ emerging in or around Kennedy's Harvard Law School classroom that does not of itself mean that left political goals have been ignored or abandoned. The critical teacher bides his time and does what he can, bit by bit, bite by bite. And the classroom, of course, takes up only a minority of the critic's time. Thus the book. Even here, Duncan does not fit in. When he gave the plenary address at the last critical networks conference in Washington, D.C., he said some interesting and personal things. He said he belonged to the governing elite: he had touched Hillary Clinton at a cocktail party at Yale, he had also met Bill, and I think George Bush senior. He then said that he had helped found the cls movement but that after feminism and Critical Race Theory had come onto the scene no one seemed any longer to want to listen to what he had to say. The founder of the critical legal conference was foundering. A political aristocrat, even if he dresses sympatico and streetwise, and a law professor at Harvard as well, he seemed to be out of sync with the contemporary academic marginalia. Sensing a loss of audience, *Critique* would seem to respond with a change in his style of writing.

⁴⁶ See JEAN-PAUL SARTRE, CRITIQUE OF DIALECTICAL REASON I: THEORY OF PRACTICAL ENSEMBLES 345-404 (1976) (describing a "fused group" as passion struggling against inertia). The fused group is a revolutionary crowd—the crowd that stormed the Bastille in July 1789, the crowd that took to the streets in May 1968, and changed reality.

As a work of scholarship it clearly knocked the socks off William Simon of Stanford Law School, though it perhaps also confused him somewhat if he felt that Duncan's peers were Ronald Dworkin and Herbert Hart. In any event, like Nietzsche, Kennedy envisages his audience as belonging not so much to the present as to the future. While there are evidently dangers in this approach from a contemporary perspective—the book is too long for students, too moderate for radicals, and too radical for moderates—it does address the *longue durée* of critique in law, and it does ask what Pink Theorists (radical white boys) can contribute. I will leave it to others to analyze, criticize, and synthesize what is admirable, questionable, or simply absent from the scholarly contribution. There is much to be said on that score but not by me, or at least not here. I am keen to reach a denouement, to unravel a final trope by getting geographical with an author whose name has such Celtic resonance.

At the level of scholarship, the project of the critical legal conference as depicted in *Critique* was that of forging an intellectual community, of “grappling” together with common existential and political conundrums.⁴⁷ Together, if only they would stay in one place for sufficient time, the critics would change the legal world. Duncan stayed at Harvard, though he seems from his footnotes to have traveled a lot. Staying at Harvard has numerous connotations, scholarly and political, and I will comment on only two. It would seem to reflect a choice against activism, and it would seem also to posit a commitment, in addition to that of teaching, to a politics of writing. The two are interconnected in numerous ways.

As regards the community of activists, I am well aware that the Marxist roots of cls positioned the critics to believe that it was practice rather than theory that would change the world. Equally, I would wish to record that I know of Duncan's clinical practice,⁴⁸ his talk at the Gramsci Institute,⁴⁹ and his commitment to writing on housing policy so as “to soak the rich more effectively on behalf of the poor's housing needs.”⁵⁰ Nevertheless, and by his own admission, it was the next generation of institutional activists, feminists, and Critical Race Theorists who seemed to become alienated from what he has to say. Certainly it is surprising that there is no evident impact of feminism in the history that *Critique* recounts. It is somehow as if the fact that feminist legal

⁴⁷ See *CRITIQUE*, *supra* note 3, at 345.

⁴⁸ Conversation with Nik Huls in Amsterdam (Winter 1993).

⁴⁹ See KENNEDY, *SEXY DRESSING*, *supra* note 13, at ch. 1.

⁵⁰ HARV. L. BULL., *supra* note 1.

scholarship came after the critical legal conference, in the first instance a chronological circumstance, precluded its use as a method in formulating the object of cls or the use of its substantive analyses in depicting the nature of adjudication. Put it this way: the other country of the feminine, *écriture féminine*, as well as gay and lesbian studies, are present in the text by way of lip service rather than substance, analysis, or teaching practice. Pink Theory is not gay or lesbian legal studies, nor, despite the color coding of childhood, is it feminist.

In the same vein, in *Confronting Authority*,⁵¹ Derrick Bell reports that, when called on to explain how a critical commitment to social reform did not lead to his active support of Bell's protest leave over the absence of any African-American women on the Harvard Law School faculty, Kennedy explained that such action "was not his way of bringing about change."⁵² The question therefore remains: what is the critic's way of generating change? I ask this in full knowledge that no one else, feminist or critic, came out in support of Bell. Equally, to resort to a personal anecdote of lesser cultural significance but equal import, when my law school in London, which is explicitly a critical institution founded and run by critics, discovered that the day on which a number of formal interviews for faculty positions would be held coincided with a strike called by the union, the Association of University Teachers, it held the interviews anyway. None of that, however, answers the activist question. Nor do the lengthy and circuitous sections of *Critique* that deal with race and law, and specifically with the critical disavowal of rights, offer any answer to Bell's gentle chiding.

In scholarly and also in political terms, *Critique* is marginal to the mainstream, but it is also ironically positioned outside the margins. To the extent that the domain of activism can be separated from the postponement of life that Barthes identified with writing, it is to the politics of writing, and specifically the politics of writing in the margins, of the eccentric and peripheral, that I will briefly turn. I want eventually to pursue the geographical connotations of margin and periphery and to suggest a reading of *Critique* that deconstructs it through these and other geographical references. Along the way, and perhaps for no very good reason, I want to assert in slightly didactic tones that the politics of writing is the subject matter of grammatology, of the

⁵¹ BELL, *supra* note 15.

⁵² *Id.* at 104.

study of writing systems, and of the wars of texts.⁵³ The battles that are fought out in the library and the archive are no less forms of political activism than vigils in one's office or quitting in protest. They are, however, different, and the study of their effects and their differences is the domain of rhetoric and of semiotics, if the latter be understood as the study of all forms of signification, of speech and writing, but also of visual media and virtual relay.

Curiously, and here I mean I am critical of this, Kennedy remains pretty closely tied to the critique of the reason—the self-representation—of adjudication. For all that he refers to rhetoric and to semiotics, he sees those disciplines as coda for addressing, respectively, the persuasiveness and the logic of judicial arguments. Rhetoric is the garb in which policy is dressed up as legal reason. It is not understood in its more active sense of the study of the figures—the signs of affect or emotion—in the justification of judgment. Semiotics is used to refer to the manner in which arguments can be reversed or flipped. It is not used as an avenue to understanding the media or visual relays through which law is recognized and promulgated in popular culture. He discusses deconstruction but neither places it in the context of grammatology nor understands it as a Nietzschean exercise in philological disruption. But these are quibbles in relation to my final theme.

There is an implicit geographical logic to *Critique*. It is through this logic that I wish to read the drama of paradox and of opposition or nonbelonging that Kennedy acts out in his work. In a sense, feminism and Critical Race Theory have also been subject to a spatial logic of outside and inside, periphery and center. Briefly put, Kennedy footnotes that when it comes to European cls, he knows most about the Italian variant. He further mentions an admiration for Arnaud's sociology of French lawyers, and when he makes the roll call of critical theorists they are all French—Sartre, Lévi-Strauss, Foucault, de Saussure, Piaget (Swiss French)⁵⁴—with the exception of a single mention of Marcuse, a German. Add to this a distinct antipathy, one I happen to share, for the Brits. Duncan is not fond of the English, and he certainly appears not to be fond of me. The English are smug.⁵⁵ If anything is to be desired, it is that *Critique* “is not, I hope, hope, hope, just

⁵³ I am thinking of Jacques Derrida, *Scribble: Writing-Power*, 58 YALE FRENCH STUD. 117 (1979), though Derrida's *Of Grammatology*, is the major study. See JACQUES DERRIDA, *OF GRAMMATOLOGY* (1976). On legal grammatology, see Peter Goodrich, *Rhetoric, Grammatology and the Hidden Injuries of Law*, 18 ECON. & SOC'Y 167 (1989).

⁵⁴ See *CRITIQUE*, *supra* note 3, at 5, 133.

⁵⁵ See *id.* at 77.

what the Brits have been saying all along."⁵⁶ So too, in parentheses, "(Oh my God, am I really just a Hartian?)."⁵⁷

My argument is that Kennedy's claim to radicalism is true to the etymological meaning of the word. Radicalism is a search for roots. *Critique* can at this level be understood in part as a response to the identity politics of feminism, Critical Race Theory, and gay and lesbian legal studies. Identity politics operate in the main according to a logic of shared genealogy, be it a geography of origin, a politics of place, a bodily map of desire, or some combination of all three. Cls, by contrast, has had no obvious constituency, no immediate identity conferred by roots or place. The critics were masculine and Caucasian, and they worked with an Anglo-American tradition of law. In his desire not to fit in, in the portrait of the law professor as guerilla, and in his hostility to me, to the Anglo in Anglo-American, Duncan stages an elaborate critique of the cultural and historical roots of American common law.

In this respect *Critique* is a work of heroic proportions. Duncan Kennedy subtly and persistently deconstructs the Anglo-American prejudices of common law. In a cryptic spirit of identity politics, in what could be termed a politics of the search for identity, Kennedy bores beneath a past rooted in English common law to find an identity with its Gallic roots, its French and Latin sources. Like all the best subversive acts, Kennedy's intervention is the more powerful for being subtle, the more persuasive for being modest in its representation. The future identity of cls lies, in this argument, in an effort, both retrospective and prospective, to move beyond the epistemic and geographic boundaries of common law. Anglo-American law is the end product of an insular and local system. It is, in historical terms, a hybrid and confused variation or subdiscipline of local Gallic law. It is a royally dictated splinter of a European law toward which English law is now returning. If the identity of cls lies in escaping the imperialist origins and epistemology of common law, if the politics of its identity are to be found in joining with those whose identity comes from outside the common law, then this critical assertion of geographical difference accurately marks the radical future of critique in law.

⁵⁶ *Id.* at 177.

⁵⁷ *Id.*